

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LANA BANKSTON

Claimant

VS.

OLATHE FOOD PRODUCTION

Respondent

Self Insured

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Docket No. 228,874

ORDER

Claimant appeals the December 21, 2000 Order of Administrative Law Judge Julie A. N. Sample wherein claimant's request for the Administrative Law Judge (ALJ) to be recused from the above matter and the claim assigned to another ALJ was denied.

APPEARANCES

Claimant is represented by Kansas City, Missouri, attorney, Stanley L. Wiles. Respondent is represented by Frederick J. Greenbaum of Kansas City, Kansas.

RECORD AND STIPULATIONS

The record consists of the transcript of the December 18, 2000¹ hearing together with the transcripts of the October 13, 1999 Preliminary Hearing; March 1, 2000 Motion Hearing; December 23, 1998 Preliminary Hearing; October 23, 2000 Preliminary Hearing; and, Discovery Deposition of Lana Bankston taken September 16, 1998, together with the pleadings and other documents filed with the Division of Workers Compensation in this docketed claim. There were no stipulations.

ISSUES

1. What is the jurisdiction of the Workers Compensation Appeals Board to consider an appeal from an administrative law judge's refusal to recuse herself from a claim?

¹ The transcript of the December 18, 2000 proceeding is entitled Transcript of Preliminary Hearing. However, the hearing was not a preliminary hearing under K.S.A. 44-534a. Instead, it was a hearing on Claimant's Second Motion for Change in Judge filed November 29, 2000.

2. Does the Workers Compensation Appeals Board have jurisdiction to remove an administrative law judge and/or reassign a case to another administrative law judge?
3. If so, did the administrative law judge err in refusing to recuse herself from this claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Board upon claimant's appeal from the Order by the ALJ refusing to recuse herself as the judge in the above case. The Board recently addressed the issue of its jurisdiction to review an ALJ's refusal to recuse himself and/or to reassign a case to another ALJ in Crone v. Great Bend Cooperative Assoc., WCAB Docket No. 239,263 (March 2001), and Garnica v. Dillon Companies, Inc., WCAB Docket No. 255,807 (March 2001).

In Crone, claimant's counsel filed pleadings requesting that the Judge recuse himself in that matter as well as requesting a blanket recusal of the Judge from all matters involving said counsel. That refusal by the ALJ to recuse himself was considered both by the Workers Compensation Appeals Board and by the Director of Workers Compensation in separate appeals. In his Memorandum Decision of January 10, 2001, Workers Compensation Director Philip S. Harness found that the jurisdiction to remove an ALJ from a workers compensation case rested with the Director. He denied claimant's motion, finding no evidence to support claimants' contentions that the ALJ was subject to bias or prejudice in dealing with matters wherein claimants' counsel represented various claimants. The Director noted that blanket recusals are not favored in the law and that the affidavits filed by the various claimants and claimants' counsel were not sufficient to support the request for a blanket recusal. The Board, in its Order, held that it was without jurisdiction to grant the requested relief. Rather, it was a power reserved to the Workers Compensation Director.

In Garnica the Board said the following:

The Appeals Board will first consider its jurisdiction to hear this matter. Neither the Kansas Workers Compensation Act, K.S.A. 44-501 *et seq.*, nor the Director's Rules, K.A.R. 51-1-1 *et seq.*, provide for a procedure to address a party's request for recusal or to address allegations of bias and prejudice on the part of an administrative law judge. The recusal issue has been considered by the Board on at least two prior occasions. In Hawk v. Rubbermaid-Winfield, Inc. and American Manufacturers Mutual Insurance and the Kansas Workers Compensation Fund, WCAB Docket No. 180,303 (March 1994), the Board was asked to consider a claimant's attorney's request to remove a certain administrative law judge from all cases filed by that particular claimant's attorney. The Board refused to accept jurisdiction

of the matter, finding it lacked authority to order an administrative law judge to recuse himself from a claim as it had no supervisory authority over an Administrative Law Judge. The Board found that authority rested with the Workers Compensation Director. A more detailed analysis is found in Boyd v. Presbyterian Manors of Mid-America, Inc. and the Workers Compensation Fund, WCAB Docket No. 163,905 (September 1997).

K.S.A. 44-555c states:

(a) There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

K.S.A. 44-534a states:

(a)(2) . . . A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

Additionally, K.S.A. 44-551(b)(1) (Furse), at the time Boyd was decided, described the Appeals Board's authority, in pertinent part, as follows:

. . . All acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge shall be subject to review by the board upon written request of any party within 10 days. . . . On any such review, **the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.** (Emphasis added.)

Since the issuance of the Boyd decision, K.S.A. 44-551 has been amended to read:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

That amendment to K.S.A. 44-551, rather than expanding the Board's jurisdiction to hear cases, appears to limit even more the Board's review of administrative decisions.

In both Hawk and Boyd, the Board found its jurisdiction generally limited to issues relating to the awarding of benefits, the compensability issues surrounding the claims for benefits, and certain ancillary matters directly affecting those claims. The Board does not have the jurisdiction or authority to order an administrative law judge to recuse himself or herself from a proceeding, the authority to remove an administrative law judge from a proceeding or the authority to order the reassignment of a claim.

K.S.A. 44-523 specifically provides that the right to assign a matter to a different administrative law judge, to an assistant director or to a special administrative law judge lies with the Director of Workers Compensation. The decision to reassign a matter may follow a request by one of the parties or "on the director's own motion." The authority to decide which administrative law judge will be assigned which case also rests with the Director of the Division of Workers Compensation as the authority in charge of the Division's administrative law judges. The Director's decisions are then reviewable by the District Court and subject to appellate review pursuant to the Administrative Procedure Act, K.S.A. 77-501 *et seq.*

The Appeals Board finds it does not have the jurisdiction or authority to order the removal of an administrative law judge or to order an administrative law judge to recuse himself from a proceeding.

The Appeals Board finds this matter is more properly before the Director of the Division of Workers Compensation.

Following its holdings in Crone and Garnica, the Board finds that it is without jurisdiction to grant the relief claimant seeks and, therefore, this appeal should be dismissed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that claimant's request for review of the December 21, 2000 Order of Administrative Law Judge

Julie A. N. Sample refusing to recuse herself from the above matter should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley L. Wiles, Kansas City, MO
Frederick L. Greenbaum, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director